UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ANDREW SNITZER, et al.,

Plaintiffs,

v. 17-cv-05361 (VEC)

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, et al,

Defendants.

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New York, N.Y.
August 26, 2020
10:00 a.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

CHIMICLES & TIKELLIS LLP (DE)
Attorneys for Plaintiffs
BY: STEVEN A. SCHWARTZ
ROBERT J. KRINER, JR.

PROSKAUER ROSE LLP
Attorneys for Defendants
BY: MYRON D. RUMELD
JANI RACHELSON
DEIDRE GROSSMAN

DANIEL WALFISH
Attorney for Ad Hoc Coalition Objectors

(Case called)

THE COURT: Okay. Good morning, everybody. Welcome to my dark courtroom. Here is what I'm going to do.

For the plaintiff, what lawyer is talking for the plaintiff?

MR. SCHWARTZ: Good morning, your Honor. It's Steve Schwartz. I'm here with my partner, Bob Kriner, but I will be presenting for plaintiff.

THE COURT: Who is going to be speaking for defendant?

MR. RUMELD: Good morning, your Honor. This is Myron Rumeld. I do have Jani Rachelson and Deidre Grossman if there are questions appropriate for them to answer.

THE COURT: Are you having any difficulty hearing me?

MR. RUMELD: We can hear you, your Honor.

THE COURT: And for -- somebody does not have their phone muted, and that means I am getting feedback. Please mute your phone.

For the ad hoc coalition of objectors, do I have Mr. Walfish?

MR. WALFISH: Good morning, your Honor. This is Daniel Walfish.

Is the Court able to hear me?

THE COURT: I am. Good morning.

MR. WALFISH: Good morning.

THE COURT: I'm just trying to get people penned on to

the screen that I know are going to be speaking.

Okay. We've already talked about the fact that you need to keep your phone muted when you're not speaking. I will try to call on people so that we have a rational transcript of what's going on.

I know someone is not muted because I just heard you talking to someone. This is a warning to everyone who is a guest on this phone. If you do not mute your phone, I'm going to knock you off the call. So please mute your phones. Thank you.

Here is going to be the order of today's argument. We're going to start with plaintiffs' counsel, which will be Mr. Schwartz. Then I'll hear anything that defense counsel wants to say. I'll then hear from Mr. Walfish on behalf of the objectors.

I then have three pro se objectors who want to be heard. I will hear from them in the following order: First, Ms. Bryant, then Mr. Stoner, and then is it Hosticka?

MR. HOSTICKA: Your Honor, it's Hosticka. Thank you.

THE COURT: If I mispronounce it when it comes back around, I apologize.

MR. HOSTICKA: No problem.

THE COURT: And then we'll come back to Mr. Schwartz to respond to anything he wants to respond to. So that's the order of today's proceeding.

So with that, Mr. Schwartz, I'm going to turn the floor over to you.

MR. SCHWARTZ: Thank you, your Honor. I appreciate that we put a lot of paper in front of your Honor. So we didn't want to be repetitive.

THE COURT: Hold on just a second.

This is my final warning on muting phones. Mute your phone if you are not speaking. Only Mr. Schwartz's phone right now should not be muted.

All right. Go ahead, Mr. Schwartz.

MR. SCHWARTZ: Thank you.

As I was saying, I'm happy to just answer questions because I don't want to repeat what's in the papers. I know we put a lot of paper in front of you. So if that's the way you want to proceed, I'm happy to do it that way.

I'm prepared to just have on overall overview of why I believe the settlement should be approved. And I'll start with that, unless your Honor wishes to proceed in a different manner.

THE COURT: Go ahead.

MR. SCHWARTZ: Thank you.

So with respect to objections, there are, percentage-wise, a very small number of objections, less than .1 percent. All of the organizations or locals that have spoken up have supported the settlement.

Other organizations like the Musicians for Pension Security -- they have not objected. While my clients, Mr. Snitzer and Mr. Livant, appreciate and understand the objectors' legitimate concerns and general concerns about the Benefit cuts that could potentially reduce their pension, about their concerns about the trustees' disclosures on fiduciary breaches. We appreciate that.

But at the end of the day, it was Mr. Snitzer and Mr. Livant who decided to step up and become class representatives, and it was my firm that became the court-appointed interim class counsel and then the class counsel.

We maximized recovery in this case. We litigated as hard as it could be litigated, negotiated as hard as it could be negotiated. It is class representatives and class counsel who get to make the initial judgment call whether we should pocket the best possible settlement we're able to negotiate or just simply go to trial and hope years down the road we can maybe get more.

Our judgment call was that the plan needs the $17 million now and it needs the governance provisions now, not years from now. Under Rule 23(e), courts just generally don't reject a settlement simply because a small minority of class members want a slightly better or different settlement or think they can better evaluate the risk and reward of proceeding to

trial or even if they just prefer to go to trial regardless of any settlement.

At the end of the day, I think Mr. Walfish stated it nicely in his brief that the standard is that the Court should make an intelligent comparison between the settlement recovery and the probable recovery at trial.

The objections really don't stick to that standard because it appears to me that the objectors are just going to be dissatisfied with any settlement short of placing the plan in receivership. We don't think that maximalist position is rooted in reality and did not warrant going to trial to try to achieve that.

While the standard for approval is that the settlement has to be fair, reasonable, and adequate -- and we think we meet that minimum standard hands down -- this settlement was much better than that.

It was our assessment and our expert's assessment that this was the best that could be done, given the fact that we have the leverage that we gained with the effective litigation that we did which that created the leverage that we did. Therefore, we think the settlement should be approved under the Rule 23 standard and even if there was a tougher standard.

With regard to the arguments regarding the standard for a release of claims for a case that someone said they want to bring for the period of October 2017 through the present,

we've been through this in our papers.

The release that we drafted and submitted for preliminary approval of the settlement agreement does not release those claims. It was very clear. To the extent there was any lack of clarity on that -- we don't think there was -- the defendants at ECF 189 made crystal clear in filing the judicial admission. That's exactly what it means. These people can file the 2017 to 2021 case if they want to. Let me make very clear that release of those claims --

THE COURT: Mr. Schwartz, let me interrupt you for a second. On the issue of release, the way you have drafted this -- this is in the proposed final judgment. The release appears on page 9 of that.

I don't like the way you drafted it. And I think, based on the parties' submissions, I understand what the parties have said. I think I understand it. I am proposing that the final order be amended as follows. So if you could all get it in front of you so you can follow me. This is page 9 of the proposed order. It's ECF document 195-1, page 9.

Mr. Schwartz, do you have it?

MR. SCHWARTZ: Yes, I do.

THE COURT: Mr. Rumeld, do you have it?

MR. RUMELD: I do. Sorry. I was on mute. Thank you.

THE COURT: That's okay.

Mr. Walfish, do you have it? You can just nod

vigorously. Okay. Everybody's got it in front of you.

Here is the proposed change. I don't like referencing another document, document number ECF 189, in my order. So I'm proposing the following, which, again, I believe is consistent with the parties' intent.

On the third line, delete that phrase that begins "consistent with" down through "release." So we will delete "consistent with the condition imposed by the independent settlement evaluation fiduciary regarding the scope of the release --"

Someone does not have their phone muted because I am hearing a side conversation.

The following phrase is deleted: "Consistent with the condition imposed by the independent settlement evaluation fiduciary regarding the scope of the release." Begin the sentence as follows:" For the avoidance of doubt about the scope of the release, the Court finds" then delete "hereby incorporate the explanation of the release offered by defendants in ECF number 189 and agrees that." I didn't use the word "find."

So "The Court finds that the release is limited to the period before the OCIO management date with respect to decisions regarding, one, the plan's asset allocation, investment return targets." And then the balance of your language remains.

So let me read that to you one more time. The order would provide as follows. Starting after the word "settlement agreement" on the third line: "For the avoidance of doubt about the scope of release, the Court finds that the release is limited to the period before the OCIO management date with respect to decisions regarding, one, the plan's asset allocation, investment return targets, and the selection (including the plan's OCIO), retention, monitoring," etc. So that is my proposal.

Mr. Schwartz, is that consistent with the parties' agreement regarding the scope of the release?

MR. SCHWARTZ: Yes, your Honor. I believe it's 100 percent consistent --

THE COURT: Hang on.

Mr. Schwartz, I can't hear you at all because someone else is talking. That means a phone is not muted.

Hang on just a second.

(Pause)

THE COURT: Mr. Schwartz, is that consistent with your understanding of the release?

MR. SCHWARTZ: Yes. I believe it's 100 percent consistent with the release in the settlement agreement and what we've tried to do in our proposed final order. I think you may have done it better, but that's 100 percent consistent.

THE COURT: Mr. Rumeld, is that also your

understanding of the scope of the release?

MR. RUMELD: It is consistent with the scope of the release. I am a little concerned, your Honor, that the explanation we wrote in the brief as to why it's consistent with the scope of the release is important for us for the reasons that we said in the brief.

I do think it's important for the purposes of an eventual claim, based on what we're hearing, that it be understood, at least on the record, that the reason those items are carved out is because they would be considered new claims.

THE COURT: I'm sorry. Say that again.

MR. RUMELD: I think it's important that it be clear that the reason these items are carved out is because they would probably be considered new claims and that's why they're not released.

We made that point in our brief. I understand your Honor's reluctance to incorporate that document. But if, regrettably, there is a new case, it would be important that that be the understanding.

THE COURT: So the order cross-references to the release, and the order is discussing what is and is not in the release.

So it all goes back to the release. Right?

MR. RUMELD: That's true. But we have accusations that the claims postdating 2017 are a continuation of the

claims predating 2017. We've explained why we view any claims postdating 2017 to be new claims, and that's why we believe it's appropriate to carve them out.

THE COURT: They're not carved out. They're just not released. That's my problem. The problem with the language that you guys are using is it's confusing. There is a release. If the claim was released, it was released. If it's not within the release, it wasn't released, period.

I think you're making this more complicated than it is because of arguments that were raised that, frankly, I didn't buy. But I understand that they have concerns.

So the order makes it absolutely clear where the line is drawn for purposes of the release. If it's not released, whether you call it a new claim or anything else, it doesn't matter. It wasn't released. Right?

MR. RUMELD: There needs to be insurance coverage for a new claim.

THE COURT: I understand that.

MR. RUMELD: So our intention is not to release new claims.

THE COURT: Meaning claims --

MR. RUMELD: Our intention is to release old claims.

THE COURT: That is very clear on the record of what the intent of the release is.

MR. RUMELD: All right. Thank you. I appreciate your

making that statement, your Honor.

THE COURT: Understood.

Mr. Walfish, does that resolve your problem with the scope of the release?

MR. WALFISH: Initially, yes, your Honor. And I appreciate the Court's edits because they are precisely what I would have suggested with one slight tweak. The settlement agreement in 8.1.4 expressly retains as the trustee's responsibility investment returns and risk objectives. So in an ideal world --

THE COURT: Hold on one second.

Mr. Rumeld and Mr. Schwartz, please mute your phones.

MR. SCHWARTZ: Apologies.

THE COURT: Go ahead, Mr. Walfish.

MR. WALFISH: Your Honor, I was saying that the settlement agreement makes very clear that going forward, the setting of both investment return and risk objectives are the trustee's responsibility.

So I would say that the Court's language goes almost all of the way towards addressing the issue we raised. But the language that the Court inserted after (i), the plan asset allocation, should say "investment return and risk targets" or "investment return and risk objectives."

THE COURT: Doesn't investment return targets encompass within it risk?

MR. WALFISH: Yes, your Honor. It does. But the settlement agreement, I presume, is worded the way it is because the parties viewed those things as somehow different or distinguishable. In fact, there was a dispute on the merits in this case about exactly that.

So I am mostly quite comfortable with the Court's edits but would say that if the goal is really to avoid any ambiguity here, a reference to risk should be added to a reference to return.

THE COURT: So what were you proposing? Investment return and risk targets?

MR. WALFISH: I would say "objectives" because that's the language in the settlement agreement as to what is the trustee's ongoing responsibility.

THE COURT: Say that again.

MR. WALFISH: Your Honor, "investment return and risk objective."

THE COURT: All right. Is there any objection to that edit, Mr. Schwartz?

MR. RUMELD: No, your Honor.

THE COURT: Mr. Schwartz?

MR. SCHWARTZ: I don't have any objection to it. I think it's duplicative, but I don't have any objection to it because it's the same thing.

THE COURT: That's fine. Done.

Mr. Schwartz, I interrupted you because we were on the release. So go ahead with your prepared remarks.

MR. SCHWARTZ: Thank you, your Honor.

With regard to the substance of the settlement, I don't think anyone has objected to the amount of money that we got from the trustees. I can say that we left nothing on the table. I do believe Mr. Stoner has raised an objection that we should have tried to get more money by suing other people like Meketa and maybe other people.

We briefed that. Our view of the case is that the focus should be on the trustees, which I also believe is the focus of all of the objectors. And it was our assessment, not just when we first started the case but throughout when Mr. Kriner and I repeatedly's evaluated and re-evaluated this issue that suing Meketa would have been counterproductive and would have undermined the claims against the trustees and would have undermined the ability to get and max out as much as we could from the insurance providers for the trustees to pony up as much as we got because it was the trustees' defense, oh, let's blame Meketa. We relied on Meketa.

As we've said in our papers and as we've said in evidence the reality is for the 2011 and 2015 asset allocations, Meketa didn't say, rah, rah. We think you should do this. We think you should take this much risk.

What Meketa said was if you want to have a target

investment return of 8 percent or 9 percent, which is really high, this is the best way we can think of how you could do that. But you, trustees, have to decide how much risk you take.

So everything we would have done if we brought suit against Meketa to prove that claim would have undermined the claim against the trustees. And we thought that the claim against the trustees was the primary one.

So that's why we did that, and we don't think that the settlement should be disapproved simply because a single objector thinks we should have sued someone else as part of the mix, whoever that may be, whether it was Meketa or someone else.

With respect to the governance provisions, which appears to be the primary substantive objection, our view is we got everything we could. It was a separate negotiation after the money.

We literally risked the money portion of the settlement by negotiating hard for several months on the governance provisions. And the provisions that we got compare favorably to all the other recent ERISA cases. We think that Mr. Irving has very substantial and effective provisions and powers to help prevent the trustees from misstepping again.

Again, under Rule 23, since we had provisions that are more stringent, more comprehensive, more tailored to the

specific facts of the case, compared to all the other ERISA settlements that have been approved in recent pension cases, the easy answer is that easily satisfies the fair, reasonable, and adequate standard under Rule 23. And we of course think it goes much, much further above that.

Just a couple points. Mr. Walfish and the ad hoc objectors' brief makes the point that if you don't have voting power, you don't have any power. But the settlement says that Mr. Irving must state his opinion on any matter on which there's either a deliberation or a vote of the investment committee. So he is actually going to be weighing in on every single issue that will come before the investment committee for deliberation or for a vote.

And he's made very clear in his supplemental declaration that he is not going to sit like a wallflower in the back and stay mute if he sees something that he doesn't like.

He will speak up, and he will document. And he said he will play it right down the middle. He's not going to favor us; he's not going to favor defendants. He's just going to call it as he sees it.

Second, on the issue of whether Mr. Irving or someone else should have been a communications fiduciary, our view is that it is class representative and class counsel who actually litigate this case and actually know this case, it is our job

to prioritize settlement demands and asks.

THE COURT: Hang on. You sort of clicked out.

It's your job to prioritize settlement demands and what?

MR. SCHWARTZ: And asks.

THE COURT: And asks. Okay.

MR. SCHWARTZ: Yes. Because many portions of settlements like this end up in a zero-sum game where if you're going to get something on this side, you're going to have to give up something on the other side.

On the communications end, we first prioritized disclosure regarding asset allocation and a comparison of the results of actively managed funds to passively managed funds because that was a goal not just in disclosures to class members, the plan participants, but also, in our view, as a goal for what the trustees had in front of them and understood during board meetings. We wanted those two things to be crystal clear.

If it had been disclosed from 2010 through 2016 that the plan had the allocations, the emerging markets equities and private equities that it did, it would have been very easy to figure out, uh-oh, this is aggressive, way over the top. Something must be wrong.

So first of all, we think that those disclosures on those investment allocations and investment performance are

very important. And we got that. The objections about well, what about having some fiduciary deal with disclosures about the plan's funded status, I kind of feel like it's kind of like the meme when I was a kid of after World War II, the proverbial Japanese sailor who was on an island cut off from communications and was fighting the war decades after it was over, we have resolved the complaint about the disclosures about the funded status from 2010 through 2017.

We have laid out what we believe the trustees did wrong in the goriest detail, and there is no doubt about that. And everyone knows now what they disclosed versus what the reality was.

The MPRA ongoing process necessarily discloses the funded status issues. Right now I understand that the MPRA application has been at least provisionally denied. I won't get into that.

But the ongoing MPRA application discloses the funded status. We think that the deterrent effect of calling out Milliman the way we did with the recent hide-the-ball documents is a deterrent effect. The Moriarity deposition that my partner, Mr. Kriner, took where we just went and, with the skillful precision, laid out, this is what you disclosed. This is what you knew. Why wasn't it there.

We think, plan counsel -- we think that the actuaries, we think that the trustees, having gone through this process,

will be very hesitant to make the kinds of disclosures that they did before.

And to the extent that there are class members who still want more disclosure about the funded status, all they have to do is send a Section 1021 ERISA request asking for the quarterly report of the actuaries which you can get going back years and obviously get going forward. And that will provide the underlying details on that.

So if anyone thinks they don't have enough disclosure on that, they have a handy tool under ERISA. They get it for virtually free. And it made no sense for us to expend our negotiating capital to have another layer of another independent fiduciary on disclosure when we already got the most important part of the disclosure and everything else we that could get we could just get by sending a letter. So that is our response to that objection.

THE COURT: Okay. Anything further?

MR. SCHWARTZ: I can respond to the other details of objections after I hear what the objectors say. I won't repeat what I said in my brief. Just briefly, service awards and the relief for my clients, I'm happy to address that now or wait, depending on your preference.

THE COURT: You can wait.

MR. SCHWARTZ: Okay. That's all I have for now, and I appreciate your Honor giving me the time.

THE COURT: Okay. Thank you. Please mute your phone.

Mr. Rumfeld.

MR. RUMELD: Thank you, your Honor. Also, it's Rumeld by the way.

THE COURT: I'm sorry. I'm totally sorry.

MR. RUMELD: This is my last chance to try and get it right for you.

THE COURT: Have I consistently mispronounced it over the entire case?

MR. RUMELD: No. It happens often.

THE COURT: I'm sorry.

MR. RUMELD: Thank you for giving me the opportunity to speak.

I would like to comment on plaintiff's attorney fee application and also just add a couple of thoughts about the settlement itself. Plaintiffs have requested fees equal to 33 percent of the settlement pot, and that would be in addition to the costs that they are seeking to recoup.

In response, among other things, we cited to some surveys that have guided numerous courts, including this Court, in determining the appropriate fee award. Those surveys, as we explain, point towards an award of approximately 25 percent rather than 33 percent. And I don't think we read any response to why those surveys shouldn't be considered and followed here.

The adjustment to 25 percent would be rather

significant as it would leave this fund with another $2 million or so in net recovery. So we just wanted to reiterate that point.

We also argued that any upward adjustment to the 25 percent on account of the success that plaintiffs claim to have achieved was something that we disagreed with strongly. Toward that end, we highlighted some of what we considered to be the principal reasons plaintiff did not really present a very strong case.

I don't intend to rehash all of these arguments right now, but I would like to just identify a few key points that we made that we don't feel plaintiffs were able or are able to refute.

First of all, although the trustees are accused of taking on too much investment risk following the financial crisis, plaintiffs cannot identify any alternative strategy that would have been calculated at the time to fare better than the one that the trustees chose. We know this because plaintiffs' own experts have admitted that they were not prepared to do that.

Secondly, plaintiffs are unable to identify any investment-related advice that was rendered by the plan professionals and that the trustees ignored to the detriment of the plan.

Plaintiffs cited to evidence of statements made by

other professionals, Mercer or the firms who applied for the OCIO position. None of these firms were retained to provide advice to the trustees, and none of them possessed the requisite information to provide such advice, something that plaintiffs' own experts eventually acknowledged.

Although plaintiffs' experts at one point accused the trustees of acting contrary to the advice of the plan's professionals, they eventually walked back those statements when we confronted them with the record evidence at their depositions as we showed in our papers.

Third point, in contending that the trustees hid the ball on the plan's financial conditions, plaintiffs repeatedly make the obvious error that helps to illustrate why their communication claims, which really weren't freestanding claims to begin with -- why these communication claims are much more complex than they would have the Court believe.

On page 25 of their most recently filed brief, just by way of example, they equate the trustees' awareness of the plan being in critical status with an awareness of a looming insolvency that they say we should have been disclosing years before 2016 when we sent that letter.

The same accusation appears in their first brief, and the same accusation also appears in the report of their expert, Mr. Witz. In his supplemental report in response to Mr. Witz's report, our expert, Cary Franklin, took Mr. Witz to task on

this issue.

He explained while critical status is a serious condition that requires, among other things, that the plan develop this rehabilitation plan, it does not signify an impending or looming insolvency. In fact, the plan can be in critical status indefinitely without ever heading to insolvency.

The fact that our plan was entrenched in critical status for several years beginning in 2011 and was not expected to emerge unless it outperformed its assumptions did not mean that the plan was on the brink of insolvency. And in fact, it wasn't at that time, as Mr. Franklin explained in his report.

By equating critical status with impending insolvency, plaintiffs are apparently conflating the concepts of critical status with another status known as critical and declining status. Critical and declining status means that the plan is projected to be insolvent in 20 years, something we might all consider to be a looming insolvency.

It is a term that first came into existence when MPRA was passed in December of 2014. And in 2016 when the plan suffered some poor investment returns, as did the rest of the market that year, the plan nearly went into critical and declining status for the first time.

That led to the disclosures, first in the summer in the annual statement, and then in the September letter that

insolvency was something that could happen and that the plan could enter into critical and declining status as early as the following year.

As it turned out, the plan did not enter into critical and declining status the following year and didn't until 2019, which is just an indication as to how movable these parts really are.

Now, look. I don't mean to suggest that the plan's financial condition was not of great concern well before 2016. since the time of the financial crisis and the plan's entry into critical status, there were ongoing discussions over the fact that the funded status of this plan was declining and what this could mean in the longterm for the plan.

As Mr. Franklin observed, there was no risk at that time of an imminent insolvency, and it would have been inaccurate to communicate that the plan was at risk of an imminent insolvency.

Nevertheless, the trustees wrestled with the relative merits of sticking to the facts on the ground and reporting what the actual projections that ERISA required were as opposed to volunteering more far-reaching statements about what might happen in the future.

They were being told by their actuaries that long-term projections past 20 years are not particularly reliable and the situation could change materially in the interim even from year

to year.

And since the trustees' responsibility is to protect the fund, some of them questioned the merits of unduly frightening participants to the point of causing them to exit the fund and thereby changing this risk of insolvency from a mere possibility to a mere certainty because if everybody leaves and no contributions come in, that's a problem too.

Now, in making this point, I'm not looking to generate any conclusions from this Court. We are hopefully settling today. I'm simply trying to point out that the communication issues that plaintiffs have cited were much more nuanced than plaintiffs would have the Court and the plan participants believe.

If this case were tried, your Honor would have the opportunity to review a voluminous record of back-and-forth discussions among the trustees and their professionals over these very issues.

Like these trustees, your Honor would be confronted with the dilemma that there is no existing legal framework to guide the decisions as to what disclosures, if any, should be required in these circumstances beyond those that are statutorily mandated and that the trustees made.

Final point. No matter how the Court evaluates these decisions or the various other decisions that were challenged in this case, there will be no disputing that they were all the

product of extensive deliberations, that they were engaged in in good faith.

Second-guessing decisions is one thing. Finding that the trustees breached their fiduciary duties is something very different. This leads to one final point, which relates to what has been accomplished by these protracted proceedings and what will be accomplished if the Court approves the settlement.

We agreed to settle this case because we thought it would be best for all concerned to put this litigation behind us and shift everyone's focus back to the very difficult issues at hand.

Unfortunately, that objective has been threatened by events that have transpired since we first agreed to the settlement. As Your Honor knows, a number of the objectors are poised now to commence a new lawsuit immediately after this one resolved.

even if they don't carry out that threat, the trustees' ability to do their job effectively has already been substantially hampered by the reputational mudslinging while this case is being litigated and that has continued right through the settlement process.

It has even extended to innocent third parties like union attorneys who have nothing to do with the plan or this lawsuit but who at the 11th hour are being accused of holding positions or receiving compensation that they don't deserve.

This reputational damage that has occurred is the product of litigation tactics that we submit were not necessary to advance this case and that certainly have not been helpful in advancing the resolution.

There are now, frankly, many among my clients who, having seen what transpired since the settlement was first agreed to, who now question the wisdom of the decision to accept this settlement, which we advised them to do.

But a deal is a deal. And I think when all is said and done, this Court has been left with persuasive arguments for approving this deal. If the Court agrees, the only thing that remains is how the Court describes its reasons for approving the settlement.

We ask that in doing so, the Court try to find a way to assure these doubting participants that notwithstanding the unfounded allegations made in this lawsuit, the fund is in capable hands. Thank you, your Honor.

THE COURT: I'm sorry. The fund is what?

MR. RUMELD: In capable hands. Thank you.

THE COURT: Mr. Rumeld, let me ask you one question. One of the themes in the defendants' brief in opposition to the attorney's fees -- let me say the plaintiffs' lawyer gets some credit for not insisting on a clear-sailing agreement.

I appreciate hearing from the defendants regarding attorney's fees because it's one of the things that's very

difficult as the neutral watching the litigation to really get a feel for, although in this case I had a pretty good sense as to what was going on.

One of the defendants' objections was the argument that the plaintiff should have settled this case far earlier and that a lot of money was wasted in pursuing discovery that was unnecessary.

What do I have in the record to look at that would say to me that in fact the plaintiffs could have gotten net of fees a better deal had they settled earlier?

MR. RUMELD: Let me say three things on that: First, I think that's a really good question. Secondly, as you can see from both sides' responses, it is difficult to provide information that doesn't compromise issues of confidentiality.

And I have to say that I'm a little bit constrained because, as your Honor can appreciate, throughout these settlement discussions, I was offering up other peoples' money. It wasn't us. It was the insurance carriers, and I'm not sure it's appropriate to go into the back-and-forth of offers and rejections.

I will also say I think there are a couple of truths that can be said. We know that the first layer of coverage was $25 million.

We understand the difficulty associated with getting into a second or third layer of coverage until the first layer

of coverage is exhausted. It's pretty clear from plaintiffs' papers that from the start, they wanted to get into those additional layers of coverage as a condition of settlement.

Where we ended up -- plaintiffs, by the way, made a point about what offers they received and didn't receive. I will just say that anybody who is in this business knows that if the carriers aren't hearing anything from the plaintiff that suggests they're in the neighborhood they're going to settle at, they never really get to hear what the carrier's number is, which was definitely a problem since the beginning of this case.

What we can see if we look at the math is there is $25 million in the first layer. We've spent about $9 million out of defense costs out of that layer. Plaintiffs are seeking approximately $10 million.

And if you sort of reverse engineer the math, you can appreciate how we might have been able to settle within the first layer and generated a net recovery that isn't much different than the net recovery we're seeking right now.

Admittedly, this is not specific enough for your Honor to really trade on. And admittedly, with confidentiality constraints, it makes it very difficult. But I also would say -- this is why I made the point about what we view to be the collateral damage that's been done here.

From our standpoint, if this case settled for a net of

$1 million or $2 million, more or less, earlier than later, we could have avoided a lot of the collateral damage that we think is material to the current operation of the plan.

And the fact that lots of ideas have been put in the heads of participants so much to the point that they're ready to file a lawsuit all over again, which we think would be completely meritless, if it is in the OCIO period, is an indication of issues that we think are relevant to that discussion.

THE COURT: Understood. Thank you.

I think I said I was going to next call on Mr. Walfish.

Mr. Rumeld, let me remind you to mute your phone, please.

Mr. Walfish.

MR. WALFISH: Thank you, your Honor.

With the Court's leave, I'd like to start by reading from a letter submitted by Objector Steven Nathan to the Treasury Department earlier this year in connection with the defendant trustees' request for permission to cut vested benefits.

THE COURT: For permission to cut?

MR. WALFISH: Vested benefits.

"I'll be 69 in a couple months, and I'm one of the less than 200 victims of a 40 percent cut to the primary

component of my life's savings. There are no new jobs for musicians my age. I can't just double up on a Roth IRA or buy some T-bills. It's too late now.

"My union promised me that if I let them defer a small percentage of my wages to this fund, they would grow them for me. And they guaranteed that when I got too old to work, I would be able to draw a defined benefit in order to pay bills, keep food on the table, cover medical expenses, and stay in my home. I planned for my retirement based on that guarantee."

The letter goes on: "It might be different if the AFMEPF had fallen into the same factors that hurt many other troubled funds, but they did not. Our fund's demographics are actually better than most. Our ratio of actives to retirees is in fact closer to typical green zone funds than to critical and declining. Our fund does not suffer the orphaned employer problem so many legitimately troubled funds do. Our trustees just failed miserably at stewardship of this fund."

Now, Mr. Nathan is not alone in his situation. And much of what he says about the mismanagement of the plan, when all is said and done, is not seriously disputed or disputable. No one has been able to point to another Taft-Hartley plan whose investments looked anything the way this one's did.

On top of that, the deception regarding fund condition is irrefutable as the trustees reassured the participants year in/year out that the actuaries are not projecting insolvency

under current assumptions.

Even as the core defense on the merits here was that the trustees were seeing projected insolvency under current assumptions supposedly making it justified to swing for the fences and try to get higher returns than that.

As another commenter to Treasury, Ken Gibas (phonetic) from Eastchester New York put it, referring to these annual assurances: "It is very hard to plan for a retirement with advice like that which turns out to be completely wrong.

THE COURT: Mr. Walfish, let me interrupt you for a second because I'm not sure exactly where you're going with this. The issue is whether I should approve the settlement or not.

MR. WALFISH: Sure. Your Honor, Mr. Rumeld says that these issues of communications are complicated. It's not complicated. It is impossible to read the trustees' communications in plain English to their membership and not conclude that they contained serious misrepresentations.

Or as the lead actuary for the fund put it in evidence just two weeks ago: "We have been hiding the ball, but we don't need to put that out. In other words, on top of catastrophic mismanagement, a serious fraud, which is a breach of the duty of loyalty, occurred here. and even though the same people are still in charge of the fund with the same leadership structure devised by the same conflicted counsel,

this settlement contains not a single measure designed to prevent future deception about the condition of the fund," as opposed to simply requiring additional disclosures on investment performance, which is separate.

Now class counsel says their settlement compares favorably to other ERISA pension settlements. Basically every one of their cited cases was a lawyer-driven challenge for record-keeping expenses and menu selection in the 401-k and the 403(b) defined contribution context.

Those things are a very far cry from fiduciary's destruction of a defined benefit pension plan, coupled with the coverup of that destruction. So those other settlements that counsel was talking about are not necessarily relevant to the comparison, but let's talk about them anyway.

Class counsel asserted in his August 12 approval papers that the most recent 401-k settlement was *Karpik* out of Ohio with no injunctive relief. And we explained in our letter last week that two days before class counsel made that representation, there was a more recent settlement submitted in this court, Judge Gregory Woods, *Bhatia v. McKinsey*, 19 cv 1466.

And the settlement there, sure enough, involved the appointment of independent neutrals with decision-making power and a role in participant communications, the two things must sorely missing from the relief here.

And *Bhatia* is not an outlier. Plenty of other settled cases have culminated in, A, the appointment of an independent with decision-making power and/or, B, the adoption of other measures designed to ensure truthful communications.

And in fact, those things are the norm when, as here, there is a credible showing of deception or other breaches of the duty of loyalty and no assurance against a recurrence.

Now, Mr. Schwartz says that I'm fighting the last war. But I'm not fighting the last war because the same people are in place with the same conflicted counsel, and there is nothing preventing them from continuing to make, as they've done right up until the present moment -- I'm not sure the Court wants me to get into details, although I could -- nothing preventing them from continuing to make what are clearly misrepresentations to their financially unsophisticated membership.

Now, unless the Court has additional questions about that, I'd like to go into a little bit more detail about some of the problems with the specific governance provisions.

THE COURT: I have a question. You are an objector.

MR. WALFISH: Yes.

THE COURT: Do you think I should decline to approve the settlement? That is, that it's in the best interest of the beneficiaries to litigate this case.

MR. WALFISH: Your Honor, I think that it is in the

best interests of the beneficiaries that there be a better settlement or, failing that, that this case be litigated. Yes, because what's been agreed on here is just not all that meaningful.

And one can see that in the defense papers talking about how the governance provisions are not only weak but literally they have no monetary value and are, in the literal sense, worthless.

I don't think that this settlement is fair and not adequate relative to the underlying facts as were shown in this case. Mr. Schwartz said that only .1 percent --

THE COURT: I'm sorry. Mr. Walfish, let me just correct something. I'm doing this for the benefit of the beneficiaries who are on the phone.

When you say what has been shown, understand this case has not been litigated. Nothing has been shown. What you had is raw discovery. That may or may not have persuaded a trier of fact, which is me.

So you can say that there's evidence, and there is. But as is typically the case in cases like this, parties have a tendency to cherrypick information that may or may not have valid rebuttal from the other side. So just to be clear, nothing has been proven in this case.

Go ahead.

MR. WALFISH: Thank you, your Honor. I understand

that was for the benefit of the listeners.

THE COURT: Well, it's for your benefit too. I don't want you making arguments that you as an attorney know are not supported by where we are in this case.

MR. WALFISH: Right. Your Honor, I appreciate the Court's point. I would not do that. The legal standards require that the Court make a comparison between what could or would have been awarded after trial and what's actually being proposed here in light of, to some extent, the evidence.

Of course the Court is not required to conduct a full trial on the merits. That would obviously defeat the purpose of this type of procedure. But I believe that the precedents do call upon the Court of course to familiarize itself, as the Court has done, with the issues in the case.

And I don't think that one can look at these disclosures that have been released recently, as well as some other things. I don't think that one can look at these communications that were made to plan participants submitted by both sides in the case and not conclude anything other than they contained a very serious misrepresentation. I am not asking the Court to make that finding. I apologize if anything I said suggested otherwise.

I want to say something on Mr. Schwartz's point that mathematically if you add up the approximately 100 individuals who have objected here -- and that includes the 68 that I

represent and another approximately 28 -- mathematically, that's still a tiny percentage of the class members.

By the way, let me just say that class counsel claims ad nauseam in their final approval papers that many of these same objectors couldn't find a lawyer for this case or decided not to bring it. That's just not at all true, and we tried to address that in our letter last week.

I think the Court appreciates that having almost 100 individual objectors is an extraordinarily large number for almost any genre of class action settlement. And this actually represents a huge percentage of the people disproportionately impacted by the defendants' misconduct.

In this union, you're accrued pension benefits for a function of how active or successful a musician you were in your working years. Those benefits are based on contributions, and the contributions, in turn, are based on the amount of work actually performed, live performances, recording sessions, etc.

Now, having presumptively ruined this fund, the trustees now are looking to cut benefits under the MPRA legislation. And there are only a few hundred families, only a few families, out of the 51,000 participants in this fund who would bear the overwhelming brunt of the cuts the trustees are proposing and may again propose.

So actually a sizable, a very plurality of the families who are most at risk are objectors here. I know that

the Court -- these are, generally, by the way, musicians who both are, one, in or approaching retirement age; and two, were full-time, successful musicians in their working years as opposed to part-timers, etc. who are generally not at much risk here and also have other employment and other sources of retirement income.

The Court of course certified this for settlement purposes as a mandatory class action. But all class members are absolutely not similarly situated in the usual sense.

So the legal precedents that talk about low percentages and Mr. Schwartz using the 0.1 percent number -- those precedents don't apply here, and that percentage is illusory. If anything, I think the large number is what should give the Court pause. Hopefully I haven't belabored that point too much.

If it's okay with the Court, I do want to say some things about the neutral that's being proposed here. I've tried to explain why I think it's a fatal defect that the neutral has no role in participant communication.

THE COURT: Has no role in participant communication. I'm sorry. Please don't let your voice trail off.

Go ahead.

MR. WALFISH: Class counsel has represented along the way that the fund has somehow turned over a new leaf because there's been some kind of changing of the guard in terms of who

is serving as regular outside counsel to the fund.

That doesn't work. The law firms that serve as regular outside counsel to this plan are conflicted because they also represent the trustees in this breach of fiduciary duty lawsuit. We tried to explain in our objection and in last week's letter why the conflicts are so problematic and there is no authority for them.

But the point is that there is no one, other than sort of these incumbents and their conflicted counsel and the actuaries of hide-the-ball notoriety, who is going to have any role going forward and no role now in participant communications.

And that's fundamentally unfair and inadequate, given both the allegations and what I would contend as the strength of the evidence here. I won't use the word "shown."

More generally, it's unclear what the whole point of install this figure, the NIF, the neutral independent fiduciary, what the whole point of installing this figure is if he can't vote. With this fund, all decisions are made by vote and only be vote of the trustees.

so this NIF is akin to a U.S. representative from the District of Columbia. He can offer his 2 cents, but that's about the extent of his power. No one has explained why the NIF has not been given a vote.

The Taft-Hartley legislation expressly contemplates

neutrals with voting power. class counsel's expert has written that a NIF needs to be empowered with genuine authority and should be given a role in participant communications. Other settlements have this. The defense, meanwhile, has made various statements to the effect that all the governance relief here is window dressing.

We have zero reservations about Andrew Irving's qualifications, capabilities, or good intentions and no reason to question his integrity. But his role is constituted in such a way that he has no actual power.

Contrary to class counsel's characterization, we never asked for receivership or anything close. We just asked that the NIF have the decision-making power that Congress contemplated and that share roles could be assigned.

Class counsel argues well, that the NIF will still be a watchdog. That doesn't withstand scrutiny either. The true mechanism for ERISA fiduciaries to police one another is not, as they say in their papers, ERISA Section 405. It's 29 U.S. Code, Section 1132(a) it's which gives any ERISA fiduciary duty the ability to go into court and bring an action against other breaching fiduciaries.

Here, the neutral, the NIF, has no budget and no ability to do that, unlike the other trustees who of course control the purse. Ridiculous as this may sound, it would be much easier for him to sue them than the other way around. So

the idea that he would be a watchdog doesn't hold water.

THE COURT: Counsel, why isn't the value of the independent fiduciary someone who, as the discussions were going along and this board was going down a route of, in his view, putting the fund in investments that pose undue risk, that his role is to say, guys, that's way too risky for a Taft-Hartley plan.

That is, you're not dealing here or I have seen not a shred of evidence that these trustees were not endeavoring to operate in the best interests of the beneficiaries. There is no evidence of self-dealing, none.

MR. WALFISH: Deception towards that end but no self-dealing. I agree with your Honor. Yes.

THE COURT: That being the case, if there is no self-dealing, someone who says, guys, you're like a toad in water when it's slowly getting hotter and you're not jumping out. It's time to jump out. This level of risk for a Taft-Hartley plan makes no sense.

Why do you view that as worthless, again, given a board that there is not a shred of evidence was not trying to do the right thing for its beneficiaries.

MR. WALFISH: Yes, your Honor. Just to be clear, I don't see that as worthless, but it's certainly not enough. In the toad in hot water situation, the other trustees could simply ignore him.

THE COURT: Of course. That's always a possibility. It's also a possibility that he would be outvoted if he had a vote. The question is, given the record in this case, which, again, is not a board that's engaged in self-dealing -- it's a board that's engaged in trying to do the right thing for its beneficiaries, that is, that throwing a flag -- in my experience, that's exactly what will sort of stop people who have gotten sort of caught up in irrational exuberance is someone throwing cold water into the pot and saying, guys, let's be real here. And that's Mr. Irving's role.

MR. WALFISH: Yes, your Honor, but with no ability to ensure that his views are documented, a topic I'll get to in a second. That may be his role, but that's insufficient because it could just be the tree that fell in the forest and no one knew that he gave that advice.

Class counsel's point here is that the existence of the NIF is quote a "litigation trap" that creates a documentary record that will either deter the trustees from breaching conduct or subject them to liability. That doesn't work because of the board minutes issue that we identified in our letter last week. That I can get into.

THE COURT: I understand your point on that. I'm going to give you about five more minutes.

MR. WALFISH: Okay. Again, your Honor, I just have already said this. But the participant communications -- this

NIF was excluded from those discussions. He's not in the room when they decide how to communicate with their membership.

I think I have two more points, your Honor. And I really appreciate the Court's patience.

THE COURT: Okay.

MR. WALFISH: First, the class should not have to pay for the NIF. In other cases that we know of where a NIF was to be installed, it was the plan's lawyers, the employers, that paid for the NIF, not the class members' retirement money.

I can tell you, having looked at the transcript of the conference that Judge Gregory Woods held to consider preliminary approval in the *Bhatia v. McKinsey* case, Judge Woods was extremely focused on ensuring that the money that McKinsey was paying for the NIF here was separate and apart from the cash settlement payment that McKinsey was making into the plan.

The judge clearly did not want that money raided or eroded to pay for the NIF, and the same is true here. The more money the plan spends on the NIF, the less goes out to class members. Admittedly, it's a drop in the overall bucket, but it's just an issue of fairness.

By the way, there's an irony here for whatever it's worth because the defense said in opposing the fee request for Mr. Schwartz that the NIF provisions have zero monetary value for the class. If that's the case, why are they submitting

plan assets to pay for it.

THE COURT: I'm sorry, Mr. Walfish. Your last point is entirely inconsistent with your entire argument. So you view the governance procedures as having value. The fact that there is not a dollars-and-cents value that can be attributed to them doesn't mean that they don't have value. And if they have value, that's the reason why the plan pays for them.

MR. WALFISH: Yes, your Honor. But he's being installed because of concerns surrounding the events at issue in this case. So it really should be, in fairness, the insurer of the fiduciaries that pays for this, particularly in circumstances where we're not remotely close to the policy limits.

I understand the point that the Court is making. I just think that to parallel this with other case that's have involved NIFs, the money really shouldn't be coming from the class members' retirement money.

The Court has been exceptionally patient with me. I really appreciate this attention to this matter. The only other thing I'd like to do, to the extent necessary as a formality, is to renew or reiterate our request for fees for objectors' counsel as set forth in our letter last week. I don't know if the Court needs --

THE COURT: Yes. That letter was thin, in fact, probably non-existent, on authority. And it was not an

adequate fee request. I have absolutely no backup for what your fees are, nor any explanation of why funds should be used to pay your fee.

MR. WALFISH: Yes, your Honor. There is a lot of authority in this circuit, starting with *White v. Auerbach*, 500 F.2d 822 (2d Cir. 1974). Another case is *Park v. Thomson Corp.*, 633 F. Supp. 2d 8 (S.D.N.Y. 2009). That one collects authorities.

There is a lot of authority for awarding fees to counsel for objectors because of the role, the important role, that objectors place in policing settlements that have been hashed out between class counsel and defense counsel.

In fact, in this particular case, I think our efforts have already borne fruit in the form of a release that cannot be -- was not subject to sort of dispute and litigation the way the parties had originally proposed. So I think we've already added value.

If the Court requires backup in the form of time spent on tasks and things of that nature, we'd be pleased to provide it. But there is a lot of support for awarding these to objectors' counsel when they bring about improvements to the settlement.

THE COURT: Okay, Mr. Walfish. I would suggest in the future, if there is a lot of authority for your position, maybe one or two cases should be cited in your submission.

MR. WALFISH: Understood, your Honor.

THE COURT: Anything further?

MR. WALFISH: No, your Honor. Thank you.

THE COURT: Thank you. Please mute your phone again.

All right. Ms. Bryant, I have unmuted you.

MS. BRYANT: Thank you. And thank you for the opportunity to speak here today, which was impossible for me because I'm in Florida. So thank you for this.

I want to introduce myself a little bit, if it please the Court, to tell you that I've had several music businesses. I'm an arranger, orchestrator, conductor. I've had a very busy career since the early '70s.

As a signatory producer, I really understand how the contracts work, the practices, how we work with contributions to the pension plan. To say that I hired the very most wonderful and greatest musicians in the world -- they're New York musicians and other musicians around the country when I worked with them.

We all worked like crazy. I'll just call us the baby-boomer musicians because we're a real working crowd and earn high pensions which are, of course, threatened right now.

THE COURT: So what kind of music did you make?

MS. BRYANT: As an arranger, I wrote in every style. For the first 20 years of my career, I was an orchestral arranger, and then electronics started to come in. But they

were very primitive. So we started to work them into the sessions to the point where it was all electronic most of the time.

THE COURT: Okay.

MS. BRYANT: I wrote music for television shows, advertising, film, scoring -- all kinds of music.

THE COURT: Okay.

MS. BRYANT: I worked with all of these wonderful musicians, and I know how responsibilities changed for master recordings works. No one has really brought this up I don't think. So I feel pretty good. I thought everybody was going to bring up my points and I wouldn't have anything to say.

THE COURT: When that happens with lawyers, they just say them anyway.

MS. BRYANT: Okay. If the lawyers can do it, then maybe I can too.

When I first read this case and heard about it, I certainly felt Mr. Snitzer and Mr. Livant had good intentions and did everything on good faith. And I thought they had a point there that I agreed with but felt would be a heavy lift to bring to a close in a good way.

Now when I look at what's been brought here is a settlement in which it's being settled on the back of musicians. We are corralled into a class action without an opportunity to opt out -- and I want to discuss that

separately -- and made to give up every right and every fraction of every right that we would have, including future governance over these improvements that are said to be made in this financial situation.

And I want to go to the wording as drafted in released parties and released claims. I found it in DI 139-1, page 67. They're overbroad, and they're all encompassing.

I think, as written, released parties and released claims -- that's Section 2.21 and 2.22 of the settlement agreement -- I think that they are disrespectful, cruel, cynical, and without appreciation for the fact that our work built the plan by and large.

There was maybe a generation before us, and we boomers who worked so hard built this plan. The managers didn't build this plan. Our contributions from our work built the wealth of this plan.

As such, I'm looking at the released parties first. It means, A, each defendant and the plan. No one has explained to me yet why I'm releasing the plan. I'm expecting to release the plan when the plan is the major beneficiary and I thought was on the plaintiffs' side.

B, it goes on with a very long list, a wish list -- I won't say it all -- each defendant's predecessors, successors, assigned, past and present and future employers.

Now let me go to assigned. When a master recording is

assigned to a new entity, for example -- I don't like the word "assigned" -- that person, that company has distribution agreements to sign that benefit musicians and benefit our pensions. Why am I releasing them.

Future employers. Employers are distributors and, in some situations, producers and clients who have a liability which is to make contributions. They have an obligation to make contributions to our pension plan which is, you know, failing.

Affiliates. That would mean the unions and the locals around the country would be released as the released parties. My feeling is it's really upsetting. They also say -- one more thing I want to say.

The defendants' spouses, dependents, beneficiaries, and marital community, heirs -- there is an unsavory practice in the industry among some producers and their clients of adding themselves to music contracts so that they get salary and they get eventually contributions to their pensions. This is wrong.

THE COURT: Whoever is telling your honey that you're on a conference call, you need to mute your phone.

MS. BRYANT: So this has happened many times, and it happened to me. And it's one of the reasons I don't want to give up and excuse everybody for everything they've ever done and give a clean slate to misdeeds in the past, the present,

and for the future and give up any governance over these improvements. Are they really going to work for us. We're giving up everything here.

If you would remove the musicians, the class members, from this or in large portion, there would be no settlement, because the way this is drafted, would release parties and release claims, is so damaging to musicians.

It means we don't even know what the actual and potential claims are in released claims. It has us giving up statutory rights and contract rights in equity. So we're giving up so much for the drafting of this. My feeling is released parties should mean each defendant, and I don't know why everybody else. Why are spouses in there.

It's releasing claims for obligations. I'm looking at this and saying, okay. We're really supposed to be talking about this financial problem and the investment and the issues surrounding it, but these words are so dangerous.

I've worked with lawyers, and I've been pro se myself. I know that an experienced litigator can, you know, that kind of linguistic prosody-- take any one of these words and say, you gave up all of your rights.

I don't know why this is not seen as we're giving up all of our rights. we're also giving up statutory rights. There's the LMRDA, the Labor Management Reporting and Disclosure Act of 1959, 29 U.S. Code, Section 411 --

THE COURT: Hang on a second.

Whoever has got the walkie-talkie, shut it off. Thank you.

Go ahead.

MS. BRYANT: The LMRDA it's called gives union members the right to sue in the district court; protection of the right to sue; retention of existing rights; and the right to copies of collective bargaining agreements, which includes recording agreements which are merged with the collective bargaining agreements.

How is this compatible with the language in released claims. Yes. Giving up statutory rights.

THE COURT: I'm sorry, Ms. Bryant. Let me just interrupt you for a second.

Released claims deal with claims that are asserted in the complaint. So the only thing that's encompassed within released claims are these fiduciary claims under ERISA that were raised against the trustees. Your recording contract -- none of that's part of this case.

MS. BRYANT: The LMRDA rights are preserved? Do I have a right to go into the district court and sue the plan? Do I have a right to do that?

THE COURT: Based on what?

MS. BRYANT: I'll give you my own story. My hundred-thousand-dollar-plus pension is $17,000 having to do

with people replacing me on my contracts. That's a serious matter that I have.

Instead of more than a six-figure pension, my pension has been raided. I have every right to go in and sue these people and get these contracts and go right to the people who have done that to me. And it may have happened to other people. I hope not.

THE COURT: Okay.

MS. BRYANT: That's why these LMRDA rights need to be preserved, your Honor.

THE COURT: I'm going to ask you to wrap up in the next couple of minutes.

MS. BRYANT: They need to be preserved. That's my main thing. I don't know why we should release everybody. It seems like a wish list that makes a clean slate for everyone else, including the unions, who say that they've lost all my contracts.

THE COURT: Okay.

MS. BRYANT: Now, we have constitutional rights, and we have also rights under ERISA, 502.83. I want to opt out. The notice that they've told us, the notice to the members of the proposed settlement, says at paragraph 14 that we have no right to opt-out because you certified that this is a class action under 23(b)(1). But in 23(c), we do have rights that deal with 23(b)(1) actions: "The Court will exclude from the

class any member who requests exclusion."

THE COURT: This is not an opt-out class.

MS. BRYANT: Does 23(c) not govern?

THE COURT: No.

MS. BRYANT: You're a judge. So I'll just appeal.

THE COURT: Okay. I'll give you one more minute, Ms. Bryant.

MS. BRYANT: Okay. My last minute is I'd like to be excluded from this class action. I was not told I was going to be a part of it as drafted. I oppose the writing and the drafting of the release claims and the released parties.

THE COURT: Thank you very much.

MS. BRYANT: And I intend to go forward with my own issues and be able to do that. Thank you.

THE COURT: You'll be able to do that if the claims are not released under the release that's been provided and that's available to you. I'm not ruling on that right now. The only thing I'm ruling on is whether I'm going to approve the settlement. So thank you for your time. I'm going to mute you as well.

Mr. Stoner, you are next. Let me unmute you.

Mr. Stoner, again, you've got five minutes. Mr. Stoner, my constant letter writer, you're not here? Mr. Stoner?

MR. STONER: I'm here.

THE COURT: You're here. Okay. All right. Mr. Stoner, you've got the floor.

MR. STONER: May it please the Court. Defendant trustees have violated ERISA by issuing materially false and misleading statements in their communications with plan participants.

Yet the proposed settlement fails to contain adequate measures to prevent future deception and dishonesty. Thus, the settlement is unfair, unreasonable, and inadequate.

I note that Mr. Rumeld agrees with me on the need for truthful plan communications. In his online article in the first quarter ERISA newsletter dated April 23, 2020, he writes: "Plan fiduciaries should pay particular attention to developing a clear record of the rationale for maintaining these investments and that this rationale is clearly reflected in participant communications.

"Plan participant communications also should be reviewed to make certain that they fully inform participants of the rewards and risks presented by their investment options in a volitive market."

Mr. Rumeld, why don't you share that article with the trustees? Because it may be news to them. In fact, according to the November 2018 deposition of trustees's co-chair Raymond Hair at page 44 when asked the question: Do you believe you have a fiduciary duty to speak truthfully to plan participants,

he answered, I don't know whether that's a fiduciary duty or not. I don't know.

So Mr. Hair didn't know that he had a fiduciary duty to speak truthfully in November 2018, one year after the new OCIO was brought in. And clearly the ongoing practice of the trustees failing to communicate honestly and openly with plan participants has continued beyond 2017.

Thus, there must be no release for any continuing claim relating to plan communications from 2010 to the present. Clearly, class counsel has failed to hold the trustees accountable by employing the one recourse clearly stated in ERISA, the removal of plan trustees.

Mr. Rumeld argues that Mr. Hair cannot be removed because the plan requires that the AFM president must be the union side co-chair. That is false because the plan must conform to ERISA requirements first as a matter of law. And therefore, the plan must be modified through plan reformation as I've previously stated.

Class counsel also likes to say that his firm was the only one willing to take this case because there were so many risks involved. However, according to *Goldberger v. Integrated Resources*, a landmark 1991 Second Circuit case, the principal analytical flaw in counsel's argument lies in the assumption that there is a substantial contingency risk in every common fund case.

At least one empirical study has concluded that there appears to be no appreciable risk of non-recovering securities class actions because virtually all cases are settled. Even when there is some contingency risk, recovery remains virtually certain. Thus, Mr. Schwartz's fees are too high for what he accomplished.

The Supreme Court in *Harris Trust & Savings Bank v. Salomon Smith Barney* has held that ERISA allows claims against non-fiduciaries who knowingly participate in prohibited transactions.

The proposed settlement therefor lacks any equitable redress for any non-fiduciaries in prudent contact and leaves all the current service providers in place. Thus the proposed settlement is unfair, inadequate, and unreasonable.

The problem here is that class counsel has put his self-interests above the interests of his client, the class members. Similarly, defendants' attorneys have also put their self-interest above their fiduciary duty as plan counsel. As such, they are hopelessly conflicted and should be removed from this case.

I hereby ask the Court to hold a separate hearing on the issue of conflicts to determine if plan counsel and any service providers are required to be replaced.

Of course the Court itself has a self-interest in this case. According to the article Reviving Judicial Gatekeeping

of Aggregation in the George Washington Law Review, February 2011, no matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket.

Thus, the Court also has a choice between its own self-interest and its fiduciary duties to class members. Will the Court reject a settlement that's unfair, inadequate, and unreasonable as required under ERISA? Or will the Court choose its own self-interest, like the other lawyers here, and issue a pro forma approval.

The failure of this Court to reject the settlement will be an abuse of discretion, as well as an arbitrary and capricious decision. Please reject this settlement, your Honor. Thank you.

THE COURT: Thank you, Mr. Stoner.

Mr. Hosticka.

MR. HOSTICKA: Thank you. Thank you. Can you hear me, your Honor?

THE COURT: I can.

MR. HOSTICKA: Okay. Great. I thank you for this opportunity very much. Besides the free press being able to participate in this judicial process, it is amazing to me. I'm grateful to you.

THE COURT: Come to court any time after COVID. Our

courthouses are always open. We love to have people come. I hope when you get your jury summons that you will respond and not try to get off of jury service.

MR. HOSTICKA: I have many times. It's been my duty and privilege too. I appreciate your comments. So I've learned a lot in this hour and a half already. So thank you very much, your Honor.

THE COURT: You're welcome.

MR. HOSTICKA: Quite quickly, my biography is that I'm 71 years old. I've been a performing professional trumpet player since the age of 18. I've supported myself and a family in that manner. I've had a lot of various, various places I've performed. Living in New York City, I'm available to a lot of different venues, let's put it that way, mostly in the classical field.

I have more than a passing interest in my pension. I've been very fortunate at this age as a boomer has been mentioned. I have the three-legged stool. I'm not here objecting on my own behalf. I am here concerned about my colleagues, my union, my pension fund, their pensions, and the governance of that.

My request that you consider my objection is based simply on the fact that the same people who have run us into this position remain. I understand the governance has been addressed. I understand there's a financial settlement which

to me seems negligible, if not insignificant, to the losses. And I would like to support that view with just three quick points, if I may.

First of all, the remedy that I'm seeking is we have competent and educated people who have a lot more ability to assess their roles. These guys just don't seem to have figured this out.

Let's start with all these illiquid assets that they pushed into, for want of their own thinking, whenever that was they decided to go that route. these are the worst investments for a person like myself.

These are investments clearly -- I know this from past experience -- for wealthy people, billionaires, hedge fund guys, millionaires. And even though these trustees might think that they're billionaires because they're in charge of a $2 billion fund, that's my money. That's not theirs to risk.

That really -- I'll tell you this also as a fact I believe -- please correct me if I'm incorrect -- that the sale of these -- what are they called? Products -- is very profitable to the people selling them. That's for sure. That's known. You ask any financial advisor. They love to sell this stuff because they make a lot of money up front. That's a governance.

Did they know what they were doing? I have to assume they were. I'm not going to even begin to say I know anything

about criminality or anything. I'm just talking about general competence. These individuals remain.

In the midst of this recovery since 2008, there was an unprecedented bull market. Now, I know I'm speaking like I know what I'm talking about, but I'm not a lawyer. I'm not an investor. It was a bull market for ten years. It's still going actually in spite of everything. It's quite remarkable actually. I'm fortunate to witness it with some of my savings.

In the midst of this, if you look at the actuarial reports, in '15 and '16 they lost money. They lost money. The value of the fund went down. Yes. I could have gone to Charles Schwab ten years ago and started like ten years ago and made money all throughout this.

And these guys -- forgive me. I'm sorry. These trustees -- they lost money for us. They were motivated to recover. There were all kinds of justifications. I'm sure their intentions were this and that, but this is what actually happened. And they're still there.

They're now presenting clients to everybody to fix this and go forward. In 20 or 30 years, it's all going to work out. The fund will be fixed. These are the folks that are now going to present to us how to fix it. I'm very, very suspicious of that.

Now, I'm sorry to say that I agree with other people that -- I have colleagues in other forms of our business, not

musicians. They're in multi-employer pension plans. None of them are like this plan in this strait. We've all been hit.

There are a lot of reasons for investing and not investing and losing and gaining. But I have no faith in their judgments. Forget about the governance and they have advisers and this and that. Their governance has been appalling.

I have no way to accuse them of criminal behavior. I have no way to do that. I also have no illusion that I'm going to turn this ocean liner around, your Honor.

I'm in favor of settlements. I've been involved with my union as a rank and file and trustee of my Local 802. I understand the need for settlement. I understand the value of that.

But I'm looking for a remedy for my fund, for my future, for my colleagues. Myself, I will survive. I was expecting a haircut. I'm looking at more like an amputation. That's my own expression.

I don't think anything that's going on in this case is going to change any of that I don't believe. But the settlement bothers me in that the same people that have created the situation are still there.

THE COURT: Understood.

MR. HOSTICKA: There does not seem to be a great addressing of that, and this may not be the forum to do that. But I do value the opportunity to speak to them through their

counsel and to use your court for that purpose. For that, I thank you very much.

THE COURT: Thank you, Mr. Hosticka.

We're going to take a five-minute break. I'm going to leave the Skype link open so you can stay on. And then I'm going to come back to Mr. Schwartz to give.

In addition to giving you an opportunity to respond if you want to, and Mr. Rumeld as well, I have specific questions about some specific issues. Five minutes. So I'm going to bring you back at 11:46.

(Recess)

THE COURT: Okay. Mr. Schwartz.

MR. SCHWARTZ: Obviously, your Honor, there's a lot that I could respond to. But I'm perfectly happy, if your Honor wants to -- you mentioned you have some questions. Maybe it makes sense to address your questions first.

THE COURT: Fair enough. So one of the questions that I don't think Mr. Walfish really harped on today but I noted it in his papers is that the way that the settlement is set up, the union trustees -- their credentials are going to be disclosed four weeks before the effective date of the appointment, which makes it sound like it's after the person has been selected but before they actually take office.

Why is that the case? Why can't the union disclose the proposed trustee's credentials before they're actually

appointed?

MR. SCHWARTZ: So that provision I will, frankly, say is not the most important portion of the governance provisions. That was at the end of the negotiation. What we got on that issue is what various people, including some of the objectors, had asked for during I believe it was the 2019 convention. We put that into my declaration on preliminary approval.

What it does is to the extent that someone picks someone who is just outrageously defective as a trustee, interested people can raise their objections and do what I'll call a PR campaign to see whether it could change the trustees' view as to whether they should be appointed or not.

As I said before, we prioritized what our asks were for the negotiation, the governance provision. And we also didn't get everything we asked for when we started, which is obvious.

What we were not candidly going to be able to get in this negotiation was, for example, us as class counsel to have the ability to say, we're going to appoint this person or that person.

THE COURT: I realize that that question was really better directed to Mr. Rumeld, and I'll come to him in a second.

For you, I'm not going to go through chapter and verse of your fee application.

Isn't your office in Haverford, Pennsylvania?

MR. SCHWARTZ: Yes. We have a Haverford, Pennsylvania, office and a Wilmington, Delaware, office.

THE COURT: Both of them are a train ride to New York. I don't understand. Like for every court appearance you've got massive expenses. It's a train ride.

MR. SCHWARTZ: Right. Your Honor, first of all, in order to avoid situations which have happened in the past for court appearances, we have to stay the night before.

I understand that Amtrak seems like it should be solid enough so you can just hop on a train and get there, but that's not always been true in my general experience.

The one deposition when I tried to do it, I got there 15 minutes late. Even there I probably should have gotten there 45 minutes or an hour early. It's just not reliable enough for us not to stay over.

The costs of the Amtrak, while I did take -- I can tell you I took Keystone trains and Northeast Regional trains when I could. So I tried to avoid the Acela expresses, which are much more expensive, every single time we could.

But there are some times, in order to get there at the right time to get out of the city, you have to take the Acela. Most of the trips I know for sure were not Acelas because I know what I did.

THE COURT: Also in your hours, you have two

categories that sort of caught my attention. One was court hearings and conferences which weighed in at a whopping 244 hours, and I am confident I have not seen you for anywhere close to 244 hours.

And lastly was your fact analysis, which in that category does not include depositions, discovery requests, or experts, was close to 5,000 hours.

Do you want to address either of those?

MR. SCHWARTZ: Yes. With respect to our category number 2 for court appearances, that also includes all of the pretrial stipulations.

So we're talking about confidentiality, ESI. We're talking about the reports, preparation for the meetings. We're talking about the bimonthly discovery report that we had for your Honor.

So it is not just like the time in court or the travel time to get to court. It encompasses a bunch of other things, and those things just take time.

THE COURT: Mr. Rumeld, I'm going to address my other two questions then to you because I realize that's really what could be negotiated with you.

So the same question that I asked Mr. Schwartz. Why not disclose the credentials of the people that the union is considering naming to the board before they're actually appointed as opposed to after they're appointed but before they

take office?

Second, if you can help me understand what is the thought process behind having an independent fiduciary trustee but not giving them a vote.

MR. RUMELD: Well, I'm going to try and respond while also recognizing that I'm a little constrained in trying to unpeel/unpack what the reasons were, particularly since they are really the product of a lot of internal attorney-client privileged discussions with my trustees about what they would be prepared to agree to or not. But I think there are certain objective statements that can be made here.

One is, consistent with really the practice of all Taft-Hartley funds that I think I'm familiar with, it is normally the prerogative of the union leadership to designate their trustees.

If we tried this case and we had a bad day, your Honor would make whatever rulings your Honor made. But in the form of a settlement, I think it's fair to say that the union leadership's prerogative was really an issue for us.

I will also point out, because I think it's relevant -- and we made some points about this in our papers, and so did Mr. Schwartz -- that this is a little bit of an unusual class action in the sense that this is not a class of random people.

This is a class of union members who have their own

democratic process, pursuant to which, if they want changes to be made in the union leadership or the union leadership's role in this fund, they have an opportunity to do so pursuant to that process.

THE COURT: I understand that. That point I fully understand.

MR. RUMELD: And it's also worth noting that while there are many of us on our side of the ledger who think it was very unfair, pursuant to that process, one of the union trustees ceased to be the leader of Local 802, and that was a significant event for them.

I'm sorry. What was the second question again? I lost my train of thought.

THE COURT: Giving the independent fiduciary a vote.

MR. RUMELD: So there too, it's a little hard to sort of explain why something didn't happen. I can tell you our firm represents many Taft-Hartley funds. There's unit voting on a fund like this.

THE COURT: I'm sorry. There is what on a fund like this?

MR. RUMELD: Unit voting, which means all the employee trustees are one vote. All the union trustees are one vote. They caucus separately when there are issues that require that.

If we made Mr. Irving a union-designated trustee or an employer-designated trustee, as a practical matter, his vote

would have no more consequence than his gravitas has as an independent fiduciary.

THE COURT: But his vote would give him a unit.

MR. RUMELD: Right. I can't tell you that that's a terrible result. It's not the result we negotiated for. It's not the result that our clients have agreed to. But I will tell you -- and this is really responsive to I think a lot of the points that Mr. Walfish was trying to make.

On the one hand, everybody is communicating confidence in Mr. Irving's background and ability and his sincerity and his desire to do the right thing. On the other hand, none of the objectors seem to be giving Mr. Irving credit for having been around the block for many years with Taft-Hartley funds and knowing how to get things done.

On this fund and on most of our funds, if there was an immediate third vote to break the tie, it would actually interfere with the type of deliberative process that has served very well.

This fund almost never goes to deadlock arbitration because somehow, notwithstanding the different agendas of the union trustees or the employer trustees, they hash it out and they come to a solution. Sometimes sooner; sometimes later. If you suddenly have the equivalent of an immediate neutral arbitrator, it actually could be disserving to that process.

THE COURT: Fair enough.

MR. RUMELD: So while it is true that my people would not have agreed to it, I actually really do feel that it would have been a negative event. We need to trust Mr. Irving to use his experience, to use his good interactions with trustees that he has spent many years honing to get to the result that everybody will want so there won't be any deadlocks here. That's the way it gets done, your Honor.

THE COURT: Okay. Understood.

Mr. Schwartz, I'm going to give you the last word but not for very long.

Anything further you want to say?

MR. SCHWARTZ: Sure. I do want to echo what Mr. Rumeld just said, that the idea of giving Mr. Irving what I'll call the rubber vote, Taft-Hartley plans are designed equal number, equal votes of employer and union side trustees.

I think people should be careful what they wish for. That could really, in some dangerous ways, change the dynamic. That is something that I don't have an answer for, whether it would be good or bad. I know enough to know that it could be dangerous. That was a consideration that we took into account for this issue of giving him a third vote.

One problem is that once he casts one vote, say, for example, for the union side, he's going to lose his credibility with the other side. And it's going to mess up what I'll call the duration of what he's there to do, which is

to help guide these trustees to do better.

A couple of other points. I think there is a little bit of a lack of appreciation that coming out of the 2008 recession that the plan got clobbered. It lost hundreds of millions of dollars.

All the objectors agree with us that the plan-funded status and expected future solvency was in deep trouble in those early years. And yet they're equating that with the actual money damages that were lost within the statute of limitations for the case that we brought.

One of the points we tried to make in our papers is that given the limits of insurance policy and even given the limits of actual damages that our experts would testify to within the statute of limitations, that was not going to change the fundamental funded status problem of this plan, given where it was, given where the music industry was.

I think Ms. Bryant said quite eloquently, because my client, Mr. Snitzer, was involved with this, when he graduated NYU Business School with his MBA, he was making a lot of his money. And he went to the music instead of the MBA stuff.

A lot of his money was being made doing the studio gigs. And now some computer geek does it and takes the jobs of many, many musicians like my client, Mr. Snitzer, for example, my client, Mr. Livant, and obviously a lot of the people who are on the line today.

And those jobs disappeared in favor of maybe one or two computer geeks which is great for them. My daughter is doing that right now, but it caused some fundamental problems with the music industry for jobs.

So there is a disconnect between what the objectors believe, that the plan was really looming and insolvent in those very early years, then their complaint that we haven't solved that problem in this lawsuit is just looking at the wrong thing because that's not what our case was, and we carved out any claims regarding the MPRA process.

But we just did not have the power, and it just wasn't our case. Maybe someone needed to bring a case back in 2010, but that was not done for a variety of reasons, again, including -- and I can say this because I know this -- including lawyers who didn't think that there was a case to be brought.

On that point, I said it in my declaration, and I'll say it again. Lawyers, good lawyers, really good ERISA lawyers, passed on this case. When I hear people on this phonecall saying there was no risk to this case, I know your Honor knows better about that. It's just not true.

There was a lot of risk. We have very competent, skilled counsel on the other side. They know how to do their job very well. The *NYU* case is a perfect example where you had a really good plaintiffs' firm. They did a trial. They had

some really good evidence. They didn't like the result that came out.

There are reasons for that. We protected against those reasons, particularly by making sure that we went all the way with our experts because the experts didn't really carry the water they did in the *NYU* case, and we were very cognizant of that.

On the issue that your Honor raised about the fact category over time, it was very difficult for our team, and we had a five-person team that accounts for 95 percent of our hours.

To put something in what I'll call fact category versus the deposition category versus the trial category versus the settlement category, we created what I'll call the mediation statements which are really summary judgment statements in a trial outline.

They all kind of blend together. I think the simple answer is that we were very efficient because it was not a case where we had two, three, four class action firms where everyone wants to get their hands in the til. And I think our Lodestar is actually lower than the Lodestar of defense counsel, even though we were the ones doing what I'll call the original work.

No matter what your Honor -- if your Honor thinks that the Lodestar is too high, no matter how you slice it and dice it, it's still going to be a very small multiplier if you grant

the fee award that was requested.

With respect to the fees, the *Goldberger* case, all the cases don't say that you get some average of every single class action, even the ones that get 2 cents on the dollar, ones that are weak cases, ones that weren't litigated, ones where there is a 5 multiplier.

You look at cases that are relevant and comparable. So when you look at those cases, every single recent ERISA pension case -- all of those are -- I don't want to call them cookie-cutter cases, but lawyers do compete for those cases.

I know my firm has some, and usually you can't get one of those cases by yourself because lots of people want to join in. Our case had a lot more risk. And in all of those cases, the courts have approved 33 percent.

Sometimes lawyers get 5 for the multipliers. Sometimes they get negative multipliers, but that 33 percent does appear to be the market rate for ERISA cases. And we think that we did a great job, not just on the money end but also on the governance end.

The issue that was raised -- I know Mr. Walfish raised what I'll call new evidence that I don't think we've ever heard before. I'm not sure that's proper procedurally, but I'm not sure any of that changes anything.

Again, we have sympathy for Mr. Nathan and every other musician who is negatively impacted by the potential of the

benefit cuts but just not our case, and the money that we're bringing into the plan is still a positive for that.

I think your Honor's reference to Mr. Irving can throw a flag properly understands the dynamic of how Mr. Irving does have a lot of power, despite not having what we call a vote.

And it puts the trustees in a very difficult position if they decide to go on a course of conduct where Mr. Irving has said, guys, and gals, that's way too risky. Don't do that.

That creates a very, very difficult dynamic for the trustee to go forward that way. And as someone who litigates these cases, that would be what I'll call litigator's gold.

And the ability of the litigator to use that, if that's the case, would be really, really -- create a lot of leverage and grease a lot of wheels in the settlement.

The idea that Mr. Irving needs some kind of litigation slush fund -- I think that misunderstands the concept here. And if Mr. Irving is on record --

THE COURT: Somebody has gotten their phone unmuted.

Go ahead, Mr. Schwartz.

MR. SCHWARTZ: The idea that Mr. Irving needs a slush fund, if Mr. Irving came to me and said, the trustees are doing something crazy, Steve. I think we should bring a lawsuit, that's a lot less risky than the lawsuit we just brought. Mr. Irving has lots and lots of power.

Regarding Mr. Walfish's request --

THE COURT: Mr. Schwartz, I'm sorry to interrupt. I'm going to give you two more minutes. You really do not have to go through chapter and verse all of Mr. Walfish's argument.

MR. SCHWARTZ: Then with respect to Mr. Rumeld's comments, we did address the Fitzpatrick study. But I think I've addressed that. We can debate all the merits of the case. The reality is that we did a good job building our factual record. Were used that as leverage.

As far as the early settlement offer issue, you asked the question well, what's the evidence in the record. I put in my declaration. I really went as far as I possibly could, made the offer to open up the window of transparency if you want to talk about what the real offers, the bids and asks, were.

The reality is that this case could not have been settled earlier and gotten the plan the same amount of money because, for whatever reason, the insurers were not putting enough money on the table for that.

If you need more transparency for that, I don't have an objection to that. This was the same typical negotiation that you get. I think that our JAMS mediator, Bob Meyer -- he went above and beyond in this case.

And it wasn't due to a failure of diplomacy because there's a settlement to be had, and people just didn't understand it. We had a big gap, and he had to work and work and work until we got the number to where it was. For that

reason, that argument we disagree with.

With regard to the other objections, and particularly Ms. Bryant was concerned about her individual claims. I think your Honor covered that nicely. We're not releasing individual contract claims that might be the release of fiduciary duties that relate to this plan.

For this kind of breach of fiduciary duty case where it's a defined benefit plan -- it's not a defined contribution plan -- the only way to do it is on a non opt-out class. You can't have different people suing over the same claims.

With respect to the issue of the released parties, in order to get peace so that an insurer doesn't pay to settle one claim and then you get a cross-claim, there needs to be peace for what I'll call the related parties, the defendants who settled the case. That happens in every case, and I went through the reasons why we did not sue those other people, and we delineated them appropriately.

Those are my comments. I'm certainly happy to answer any other questions that may be out there. The bottom line for us is that having been through this rodeo many times and having defended judgments on appeal that I've had and basically taking settlement positions, I'm not giving a single dollar away because I was able to evaluate the risk, and I've been successful in that.

Our best judgment and our expert's best judgment is we

got everything there was to be had here. It's a really good settlement. I think that there's a little blind spot with some of the objectors that just because they think the trustees aren't doing a good job, say from 2017 to 2020, our governance provisions have not yet taken effect.

I kind of feel like they're denigrating the governance provisions because even though they haven't taken effect, they didn't do something during the 2017 through 2020 period.

And that obviously is something that Mr. Irving and the new OCIO monitor has not had a chance yet to do. So we feel very good that these governance provisions will provide a big impact and, along with the money, create a settlement that is in the best interests of plan participants.

As I said before, this plan really needs the governance and needs the money now. It is not in a position to wait the many years it will take if we went through trial and appeal.

THE COURT: Thank you, Mr. Schwartz.

One other question for Mr. Rumeld.

To the extent you can tell me, what was the thought in terms of the term that Mr. Irving is severing? The four or five years.

MR. RUMELD: Well, it was the product of extensive negotiation. On Mr. Schwartz's behalf, I think I would say that we really proposed a much shorter duration and a much

narrower scope of work, and Mr. Schwartz very aggressively bargained from that position.

So I don't know that there's a particular magic to the period of time. But I would say that when you think of sort of the frequency with which the fund meets, the initial period of time it will take until Mr. Irving is completely up to speed and understands what's going on, our feeling is the four-year period is plenty enough for him to assess what's going on, steer the fund, if it needs any steering independent of the path that it's already on; and have us sailing going forward.

Anything beyond that would seem more like the type of situation we have with say the Teamsters or some situation where trustees are accused of doing some real wrongdoing, and nobody on my side would have appreciated those types of implications.

THE COURT: Okay. Thank you.

Thank you to everybody.

MR. WALFISH: Your Honor, I'm sorry. May I be heard just on a point that Mr. Rumeld made with respect to his answer to your questions regarding the NIF and the voting?

THE COURT: You have one minute.

MR. WALFISH: Mr. Rumeld's point was that to give the NIF a vote would upset this tried and true dynamic where union and employers are equally represented. As the Court knows, the statute expressly contemplates voting neutrals.

All I would say is that the result, the result of the traditional dynamic, is not great. This fund is undeniably very, very troubled and has been so for some time. And it's in a very small minority of peer funds that are in this kind of trouble. So it's not as if the system that they've been using has worked so well.

On the be-careful-what-you-wish-for, the NIF's term is time limited. So if the NIF were given a vote and if that didn't work out to everyone's satisfaction, fairly soon people could revisit whether they want to preserve the NIF. That's pretty much all I wanted to say. Thank you, your Honor.

THE COURT: Thank you, Mr. Walfish.

I want to remind everybody to mute your phone.

The Court is going to approve the settlement, and I'm overruling all objections. I am sympathetic to the plan beneficiaries and to the frustrations and the concerns of the objectors.

Their defined benefit plan, which many counted on for a comfortable retirement, is in trouble. And it is likely to be in a lot more trouble today than it was a year ago, not because of any decisions made by the trustees, but because of the devastation to the economy caused by COVID.

I also understand that there are members of the union and plan beneficiaries who are unhappy with current leadership at the union. I also understand that those people are in the

minority. I know they are in the minority, because if they were in the majority, they would have voted the perceived rascal out by now.

As everyone understands, this is a settlement. That means two things: First, no one will get everything that they want; and second, the perfect should not be the enemy of the good.

Pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure, the court may approve a class action settlement that is binding on class members after conducting a hearing and finding that the settlement is "fair, reasonable, and adequate."

In making that determination, the Court must consider whether the class representatives and class counsel have adequately represented the class and whether the settlement was negotiated at arm's length. That's what's known as procedural reasonableness.

The Court must also consider the adequacy of the relief, taking into account "the costs, risks, and delay of trial and appeal" and the amount of attorney's fees. That's called substantive reasonableness.

Before turning to the adequacy of the settlement, which is the most important factor, I'll say a quick word about procedural fairness. Having presided over this action since it was first filed in 2017, which included a motion to dismiss and

numerous conferences, including several that took place while the settlement talks were ongoing, I have no doubt that the settlement agreement was reached after an arm's-length negotiation.

Class counsel is experienced and has been competent and thorough, both when litigating the motion to dismiss and when conducting extensive fact and expert discovery.

When a settlement is the product of an arm's-length negotiation between competent attorneys after meaningful discovery, there is a presumption that the outcome is fair, adequate and reasonable. See Wal-Mart Stores, Inc. v. Visa. U.S.A,, Inc., 396 F.3d 96 --

Let me remind everybody to mute your phone.

-- 396 F.3d 96 at page 116 (2d Cir. 2005). There is also a "strong judicial policy in favor of settlements, particularly in the class action context," in part, because prolonged litigation both delays and reduces the resources available to redress the harms suffered by the class, same case.

Now, turning to the adequacy of the relief, I have considered all of the submissions from class members. By my count, there were about 100 individuals who objected to the settlement out of a class of approximately 115,000. That's at docket 194-3.

Approximately half of the objections were formulaic

objections. Overall, the submissions expressed three primary concerns: First, that there are inadequate restraints on the trustees to prevent them from pursuing high-risk investment strategies in the future; two, that the neutral independent fiduciary trustee lacks sufficient influence and permanence; and three, that the trustees who mismanaged the fund are allowed to remain in place. There are also some concerns about the scope of the release provisions, but those were resolved today in the oral argument.

The Court has also received letters of support which were not solicited in the class notice from two individuals and one entity who support approval of the settlement. The entity was the International Conference of Symphony and Opera Musicians, which represents 52 orchestras, 41 of which rely on the fund for their musicians' retirement benefits.

Those expressing support say that the trustees are not responsible for the fund's problems and that the trustees should be allowed to devote their full attention to solving the very real challenges facing the plan.

The measure of a fair settlement is not only whether other remedies are possible or could have been obtained if plaintiffs were successful at trial. The Court must consider the strength of the plaintiffs' case and the likelihood of success, taking into account the complexity, expense, and likely duration of litigation, as well as the overall reaction

from the class and the ability of the defendants to withstand a larger judgment. See *Joel A. v. Giuliani*, 218 F.3d 132 at 138 (2d Cir. 2000).

In terms of likelihood of success for the plaintiffs at trial, this is a risky case. When I denied defendants' motion to dismiss, I explained that although plaintiffs managed largely to succeed in getting past the motion to dismiss, this was going to be a hard road to hoe on the merits.

The reason it is a hard case to make is that this is not a board of trustees that did nothing or that engaged in self-dealing. The board asked questions. They participated. They listened to their consultants who are not fly-by-night operators.

They have a reasonable defense, both in terms of the allocations decisions they made and in terms of the active versus passive management. Moreover, even if plaintiffs had prevailed on showing that there was a breach of fiduciary duty, which is by no means clear, it would have been a substantial battle of the experts over whether and to what extent the fund was harmed and significant uncertainty as to what type of equitable relief would be appropriate, if any.

In short, this is a case where both parties had litigation risk. That fact renders many of the objectors' objections unfounded. The settlement reflects a reasonable compromise, both from a money perspective a governance

perspective.

Class counsel negotiated a gross settlement amount of $26,850,000. While that does not entirely cap out the insurance proceeds, it is a reasonable financial settlement given, as noted, the significant litigation risks associated with the case.

Further litigation to trial and a potential appeal would have been much more expensive, could have delayed the fund getting any relief for years, which would have caused it to lose the compounding effect of getting new dollars into the fund sooner rather than later and likely would have further depleted insurance proceeds available to pay any judgment. The trial alone was expected to take a full month, which would have generated millions more in fees and costs.

In terms of the amended governance procedures, the addition of an independent fiduciary is meaningful, even if it is not the home run that plaintiffs' counsel represents it to be.

The ad hoc committee of objectors want to make it sound as though it is totally useless because the independent fiduciary does not have a vote. the Court disagrees.

Having a neutral, well-informed party at the table who can raise alarms if he thinks the trustees are being insufficiently skeptical of the fund's experts or are making decisions that are unduly risky or, particularly now, unduly

cautious is a meaningful addition to the governance of the fund.

This is particularly so when there is no evidence of self-dealing by the board. At best, the plaintiffs' case shows a board that was leaning too far forward chasing returns in the hope that they could dig the fund out of the hole that was caused primarily by the 2008 recession.

The independent fiduciary has the ability, if necessary, to splash cold water in everybody's face if he sees that happening again, assuming, without deciding, that is what happened during the class period.

Assuming, as I do, because there is no evidence that this is not true, that all of the trustees had the best interests of the fund at heart, having a third party present to provide a reality check from time to time is a useful thing.

That said, while I will not impose it as a condition of approving the settlement, I urge the board of trustees to consider making two changes. At a time when the plan is in deep trouble, clear, trusted communications with the beneficiaries of the plan is critical.

Whether it should have happened or not, the disclosure of internal communications by the inside players has fomented distrust which is not good for anyone. Giving the independent fiduciary a vote over approval of the minutes might help restore trust without upsetting in any meaningful way the

balance between labor and management that is struck in the normal governance of a Taft-Hartley benefit plan.

Similarly, I would urge the board to consider whether an extension of the independent fiduciary's term longer than the four or five years agreed to, depending on the state of the plan at that time, is appropriate.

I would also urge the union to consider one change in its obligations. As the settlement is written, the union is obligated to give notice of the identity and qualifications of its newly appointed representatives to the board four weeks before their appointment is effective.

I encourage the union to consider providing notice of who it intends to appoint and their qualifications several weeks before the person is actually appointed to encourage members to weigh in if they believe an intended appointee is insufficiently qualified to serve.

At the end of the day, it doesn't impinge on the president's prerogative or his obligation to appoint someone who is qualified. But hearing from members might be valuable from their perspective, and it may be valuable from his perspective. He may hear something that he hadn't considered.

In terms of the overall response from the class, the 100 objections represent less than .10 of 1 percent of the class. The Court of Appeals has found that a similar response rate weighs in favor of approval. See *D'Amato v. Deutsche*

Bank, 236 F.3d 78 at 86 to 87 (2d Cir. 2001) (affirming that 72 opt-outs and 18 written objections supported approval of settlement affecting approximately 28,000 class members).

Taking all of the relevant factors into account, the Court finds that the relief afforded to the class is within the range of reasonable outcomes in this litigation.

Finally, we get to plaintiffs' attorney's fees. They are seeking $8.95 million in fees and $863,811.37 in costs. This represents a 33 percent fee for a firm that represents the class on a contingency fee basis.

For any class member on the phone who isn't an attorney, that means that plaintiffs' counsel has worked on this case devoting thousands of hours and substantial out-of-pocket expenses with no payment and no guarantee of payment.

Defendants argue that for a settlement of this size, a 25 percent fee is more common, particularly in ERISA cases. Plaintiffs argue that their requested fee is approximately what their Lodestar is.

And in any event, defendants do not seriously contest the hours spent. Instead, defendants argue that the hours were needlessly spent pursing fruitless and unnecessary strategies.

They make the argument that the case could have settled earlier, but I have no evidence that that was possible or that it would have yielded a more favorable outcome for the

class.

As an overarching premise, counsels' fee request must be reasonable. To ensure that, the Court must first determine a reasonable baseline fee using similar cases of comparable complexity.

In very large settlement funds, a smaller percentage recovery may be appropriate. Second, adjustments can go up or down based on: "One, the time and labor expended by counsel; two, the magnitude and complexities of the litigation; three, the risk of the litigation; four, the quality of representation; five, the requested fee in relation to the settlement; and six, public policy considerations. That's *Goldberg v. Integrated Resources, Inc.*, 209 F.3d 43 at page 50 (2d Cir. 2000).

Finally, the Court performs a Lodestar crosscheck. As a starting point, an empirical study has found that in ERISA cases, the average monetary recovery was $25.75 million, just south of the $26.85 million recovery in this case.

The median and average fee award in that sample of ERISA cases was 26 percent of the recovery. That's from *Theodore Eisenberg et al., Attorneys Fees in Class Actions*: 2009-2013, 92 N.Y.U. L. Rev. 937, 952 (2017). That study found a slight variation in fees based on the riskiness of the case. High-risk cases garnered a fee award equal to 29.2 percent of the recovery, while low-risk cases earned 24.5 percent. That's

at page 959.

Defendants are correct that cases awarding a fee of 33 percent frequently involve a smaller settlement amount and reflect above-average recoveries. I would note that the data and the study I cited was gathered about a decade ago. The average recovery has likely gone up a little since then just based on inflation.

In terms of adjustment but using the Goldberg factors, plaintiffs' counsel is entitled to a slight upward adjustment for taking on a case that was quite risky and that involved a very substantial commitment of time and money with no guarantee of recovery.

The quality of representation was good, but it was in line with what would to be expected in a case of this sort. Thus, quality is neutral in terms of the appropriate amount of attorneys' fees.

Discovery was voluminous involving at least half a million documents, nearly 30 depositions, and six experts. That can be found at docket 139, paragraphs 39 and 40.

While the complexity of the case warrants some upward adjustment, counsel does not warrant the upward adjustment requested because the nonmonetary relief in this case, while valuable, was not exceptional.

In terms of the Lodestar crosscheck, my assessment is that there were a lot of hours spent on this litigation, and

many were spent by partners that have high billing rates, and many were unnecessary.

For example, the Court agrees with the defendants that requests for emails that included the word "delete" was silly and needlessly increased costs and fees to both sides.

Moreover, much of the work that seems to have been done by partners, including 643 hours of document review, could have easily been done by associates at a substantially lower hourly rate.

Combining all of that, I find plaintiffs' requested fee of 33 percent is excessive. And I will reduce it to 29 percent or $7,786,500 which is a little above average for ERISA claims and for common fund claims of this size but is warranted for the reasons noted.

Plaintiffs' expenses are bloated. Copy costs were billed at 50 cents a page for color papers and 25 cents a page for black-and-white copies and scanning. Plaintiffs argue that I should take into account that much of the copying in this case involved odd-sized documents and involved making copies for depositions on "quick turnaround."

I am confident that while some of the copying and scanning involved odd-sized documents that involved more labor than normal copying, I am also confident that in a case of this sort, a substantial amount of the copying was routine, 8 1/2-by-11 copies, for which 25 or 50 cents per page is

nothing short of highway robbery.

To the extent copying was done on a "quick turnaround basis," shame on counsel. You knew when the depositions were, and you knew what your hot documents were. Being required to make substantial numbers of copies for depositions on a quick turnaround basis simply reflects poor planning.

In short, copy costs will be reduced by 40 percent which brings the per-page cost to 15 cents per page for black-and-white and scanning or 30 cents a page for color, which is still quite generous given that normal, routine, black-and-white copying should not exceed 5 cents a page.

Travel expenses are inflated. Looking only at the expenses associated with the court appearances, it's apparent, as counsel acknowledged, that counsel came to New York the night before an appearance or stayed over an extra night.

Counsel is free to do so. And let me say that New York certainly appreciates your taking advantage of our restaurants and hotels. But that was not necessary, and the associated costs should not be borne by the class.

Because travel expenses associated with court appearances are inflated, the Court finds it reasonable to conclude the expenses associated with depositions are similarly excessive.

In sum, without going line by line through expenses, the Court is going to impose a 40 percent reduction on copy

costs and a 50 percent reduction of all expenses, other than expert fees.

After all adjustments, plaintiffs' counsel shall receive the following in expenses: $652,856.38 in expert fees, $31,603.80 in copying and scanning costs, and $28,744.27 in travel expenses for a total of $713,204.45.

Finally, plaintiffs are seeking $10,000 service awards for the named plaintiffs to be paid from plaintiffs' attorney's fees. There has been no objection from the class. Therefore, those awards are granted.

Because there has been no objection to the release of the class representatives, I will also grant the request that they be provided a release, although I am still at a loss to know what lawsuit could be brought against them.

Counsel for the ad hoc committee requests $132,975 in fees from class counsels' award. That request represents 197 hours at $675 an hour. Other than clarifying the language of the release, counsel provided no meaningful relief for the class.

Even if he had, he's provided no support for his requested fee. His request is wildly out of proportion to the limited benefits of the clarification of the intent of the parties. Accordingly, that request is denied.

Any request or objections that I have not expressly discussed during the course of this opinion are denied.

Mr. Schwartz, anything further?

MR. SCHWARTZ: No, your Honor.

THE COURT: Mr. Rumeld?

MR. RUMELD: No, your Honor. Thank you.

THE COURT: Everybody, thank you very much.

(Adjourned)